No. 73-58

FILED
JUL 3 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NICK SENAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAX COHEN
504 Broadway, Suite 1012
Gary, Indiana 46402
(219) 886-3505
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Constitutional Provisions Involved 5

Statement of Facts 5

Reasons for Granting the Writ 7

A. The Petitioner was not acting under "color of law" 7

B. There is no deprivation of property without due process of law 11

C. The Government has abandoned its right of appeal 13

Conclusion 16

Appendices:

Appendix A—Opinion of the Court of Appeals App. 1

Appendix B—Order and Opinion of the United States District Court ..... App. 11

Appendix C—Indictment ..... App. 17

Appendix D—Order denying Petition for Rehearing ..... App. 22

AUTHORITIES CITED

Cases

PAGE

Anderson v. Richards, 173 Ohio St. 50, 179 N.E. 2d 918 (1962) 15

Bankers Life and Casualty Company v. Chicago, 21 Ill.2d 172, 171 N.E.2d 577 (1961) 14

Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972) 9

Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970) 10

Espinoza v. Rogers 470 F.2d 1174 (10th Cir. 1972) 7

Fletcher v. Hook, 446 F.2d 14 (3rd Cir. 1971) 10

French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) 8

International Association of Machinists v. Federated Association of Accessory Workers, 133 Texas 624, 130 S.W.2d 282 (1939) 14

Jones v. Jones, 410 F.2d 365 (7th Cir. 1969) 9

Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968) 10

Newman v. Moyers, 253 U.S. 182, 40 S.Ct. 478, 64 L.Ed. 849 (1920) 14

O'Brien v. Colbath, 465 F.2d 358 (1972) 8

Rowland v. Kreyenhagen, 24 Cal. 52 (1864) 14

Sullivan v. Gage, 145 Cal., 79 Pa. 537 (1905) 14

Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972) 8

Tait v. Western Maryland Railroad Company, 289 U. S. 620, 53 S. Ct. 706, 77 L. Ed. 1405 (1933) 15

U. S. v. Apex Distributing Company, (CA 9, 1959) 270 F.2d 747 14

PAGE

U. S. v. Cooney, 217 F. Supp. 417 (D.C. Col. 1963) 10

U. S. v. Grochowski, 454 F. 2d 657 (CA 7, 1971) 15

U. S. v. Moser, 266 U. S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924) 15

U. S. v. Ponto, 454 F.2d 657 (CA 7, 1971) 15

White v. U. S., 377 F.2d 948 (CA D.C. 1967) 15

Statutes

Burns' Ind. Stat. 4-5716, Vol. 2, Part 4, 1968 Replacement 3, 11

18 U.S.C. 242 ..... 2, 3, 5, 7, 12, 16

18 U.S.C. 3731 14

28 U.S.C. 1254(1) 2

42 U.S.C. 1983 ..... 4, 7, 8, 9, 10, 12, 16

Rule

F.R.C.P., Rule 12(5) 15

Constitution

Amend. X 5, 11

Amend. XIV 10

Other Authorities

1968 U.S. Code Cong. and Adm. News, page 1837 10

American Law Institute, Restatement Judgments, Sec. 70 15

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

NICK SENAK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Nick Senak, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 24, 1973. A petition for rehearing was timely filed and denied on June 5, 1973.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A. The opinion of the United States District Court, unreported, appears as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 24, 1973. A timely petition for rehearing was filed and denied by order of Court on June 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In February, 1972, a Federal Grand Jury returned a five count indictment against the petitioner, a public defender for Lake County, Indiana. The indictment charged that the petitioner, while acting under color of law, wilfully and unlawfully exacted and took money from various persons, thereby wilfully depriving those persons of their right under the Fourteenth Amendment not to be deprived of property without due process of law in violation of 18 U.S.C. 242. The pertinent part of that statute provides as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, territory or district to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States . . ." (is guilty of an offense)

The indictment is reproduced as Appendix C. A motion to dismiss was filed and on March 27, 1972, the District Court sustained the motion on the ground that the indictment

failed to state an offense against the United States of America. The order and opinion of the District Judge has been set forth in Appendix B.

Specifically, the five counts of the indictment charged the petitioner that, notwithstanding his appointment under Indiana law as a pauper attorney, the petitioner exacted fees from a pauper client (Count 1) and from friends or relatives of other impoverished clients (Counts 2-5) by threatening inadequate legal representation of those he had been appointed to represent unless the extra sums were paid to him. The questions thus presented are:

1. Is a pauper attorney by virtue of his appointment to represent an indigent client acting under color of State law so as to be subject to the provisions of 18 U.S.C. 242?
2. Does a pauper attorney who, allegedly, threatens inadequate legal representation of his clients unless he is paid a fee by the client or members of his family, deprive those persons of property without due process of law?
3. After a motion to dismiss has been sustained and the Government initiates an appeal and thereafter dismisses its appeal, is the Government barred from refiling substantially the same indictment in the United States District Court?

STATUTES INVOLVED

The statutes involved are as follows:

Burns' Ind. Stat. 4-5716, Vol. 2, Part 4, 1968 Replacement which provides as follows:

"Public defenders—authority to appoint—recovery for services—The Judge of the Criminal Court or any division thereof in the counties having a population of 400,000 or more according to the last preceding

United States census in which a separate criminal court is established is hereby authorized to appoint one or more public defenders as he may deem necessary to defend any poor person accused of the commission of a crime and not having sufficient means to employ an attorney at law to defend himself or herself: provided, however, that the county attorney shall bring suit on behalf of the county at the request of the judge of said court or any division thereof for recovery of a reasonable sum for the service of the public defender rendered on behalf of any such poor person whenever it appears to the Court that said person has sufficient means to employ an attorney. All amounts so recovered shall be paid into the county general fund."

18 U.S.C. 242 provides as follows:

"Whoever, under color of any law, statute . . . wilfully subjects any inhabitant of any State, territory or district, to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than one thousand dollars or imprisoned not more than one year or both . . ."

42 U.S.C. 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Ten, Rights reserved to States or people—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

STATEMENT OF FACTS

On May 7, 1971, an indictment was returned against the petitioner in the United States District Court for the Northern District of Indiana charging him in five counts with violation of Title 18 U.S.C. Sec. 242. All five counts were identical, except for the name of the victim. A representative allegation of that indictment was:

> " . . . Notwithstanding his appointment as pauper attorney, in or about March of 1967, Nick Senak illegally charged Larry Laban Smith a fee to represent him, thereby depriving him of property without due process of law."

A motion to dismiss was addressed to the indictment and on October 19, 1971, the District Court entered an order sustaining the motion.

On November 18, 1971, the Government filed a notice of appeal and within the time allowed an appeal was docketed in the United States Court of Appeals for the Seventh Circuit entitled United States of America, Plaintiff-Appellant, v. Nick Senak, Defendant-Appellant. On January 29, 1972, the Government filed its motion to dismiss that appeal and the appeal was dismissed in the United States Court of Appeals on February 24, 1972. In the meantime, the Government, on February 10, 1972, refiled the indictment in the United States District Court charging the identical five transactions in the original indictment. The charging part of the indictment was altered. A representative allegation of the second indictment reads as follows:

"... Notwithstanding his appointment as pauper attorney in or about March of 1967, Nick Senak wilfully and unlawfully exacted and took approximately four hundred dollars from Larry Laban Smith by representing to Smith that a payment of money to him (Senak) was required or he would not adequately represent Smith in connection with the same manner as to which Senak had already been appointed to represent Smith as pauper attorney; and Nick Senak did thereby wilfully deprive Larry Laban Smith of property without due process of law ..."

A second motion to dismiss was addressed to the indictment and on March 27, 1972, the District Judge entered an order dismissing the second indictment. A second appeal was perfected by the Government resulting in the opinion of the United States Court of Appeals for the Seventh Circuit entered on April 24, 1973, which reversed the order of the District Judge and remanded the cause to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

A.

THE PETITIONER WAS NOT ACTING UNDER "COLOR OF LAW".

The question presented has never been ruled upon by this Court or by any other District Court or Court of Appeals insofar as a criminal prosecution is concerned. There have, however, been a number of cases brought under the provisions of 42 U.S.C. 1983, the civil counterpart of Sec. 242, which have expressly and unequivocally held that a pauper attorney is not acting under color of law so as to be subject to a civil action for deprivation of rights.

In *Espinoza* v. *Rogers,* 470 F.2d 1174 (10th Cir. 1972), an action was brought under 42 U.S.C. 1983, against the defendants in their capacities as attorneys for the Colorado Public Defender's Office. The plaintiff claimed that he was denied due process and equal protection of the laws because the defendants had grossly mishandled his defense.

In a *per curiam* opinion, the Court of Appeals held:

> "It is well settled that in order for a defendant to be liable under the Federal Civil Rights Act he must have acted under color of State law to cause the denial of a federally protected right. The Colorado Office of State Public Defender derives its existence from Colorado statutes. These statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally, a Colorado Public Defender's professional duties and responsibility towards his clients are identical in all respects to any other Colorado attorney, whether privately retained or court-appointed. Therefore, we hold that an attorney does not act under color of State law simply because he has accepted employment as a Colorado Public Defender . . ." (At Page 1174, 1175)

The Court of Appeals for the Fifth Circuit has held to the same effect in *O'Brien* v. *Colbath,* 465 F.2d 358 (1972), stating:

> ". . . In our opinion (Sec. 1983) was never intended as a vehicle for prosecuting malpractice suits against court-appointed attorneys . . ." (at Page 1155, See also Nelson v. Stratton, 469 F.2d 1155, 5th Cir. 1972) (Civil Rights Action against privately retained attorney dismissed on ground that attorney was not acting under color of State law).

In *Szijarto* v. *Legeman,* 466 F.2d 864, (9th Cir. 1972) the Court of Appeals upheld a dismissal of a civil rights action brought under Sec. 1983 against the plaintiff's retained attorney for alleged failure to render him reasonable assistance during the course of a State criminal trial.

In a *per curiam* opinion, the court stated:

> "That this circuit, in common with others, has held that such a claim is not within the purview of the Civil Rights Act. The reason being that an attorney *whether retained or appointed* does not act under color of State law; hence, the claim is not one coming within the jurisdiction of the District Court." (our emphasis)

The Court of Appeals for the Seventh Circuit has held that a court-appointed lawyer is not acting under color of State law so as to be responsive in a suit for damages brought under Sec. 1983, *French* v. *Corrigan,* 432 F.2d 1211 (7th Cir. 1970), stating:

> ". . . Just as the prosecutors did not lose their immunity by reason of the alleged conspiracy, neither were the acts of Corrigan done under color of law. They were appointed by the trial judge to represent plaintiff on his requested appeal, they were not functionaries of the State, they were proceeding in their private capacity acting on plaintiff's behalf. . ." (at P. 1214)

In *Jones* v. *Jones,* 410 F.2d 365 (7th Cir. 1969), the Court of Appeals upheld an order dismissing the plaintiff's complaint in a civil rights action brought under Sec. 1983, brought by the plaintiff against his counsel in a criminal proceeding stating:

> "... Lawyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of State law within the meaning of 42 U.S.C. 1983. . . The State merely provides a forum for the litigants and, although lawyers are considered officers of the Court, they are not officers of the State within the meaning of the Civil Rights Act. ..."

In *Brown* v. *Joseph,* 463 F.2d 1046 (3rd Cir. 1972), the Court of Appeals upheld the dismissal of a civil rights action by a former client against a court-appointed trial attorney employed by the public defender's office of Pennsylvania County. The basis of the decision was twofold: (1) That a private attorney is not a State officer so as to bring his actions within the purview of the Civil Rights Statute; and (2) That a county public defender whose office is created under State statute enjoys immunity from liability under the Civil Rights Act, even if he was acting under color of State law.

In *Brown* v. *Joseph,* the public defender argued that, once his appointment in a given case is made, his public or State function ceases and that thereafter he functions purely as a private attorney; that his professional relationship with his client takes on all the incidents and considerations attendant upon a private attorney-client relationship; that every aspect of his professional relationship to his client within the framework of ethical represen-

tation thereof which conceivably could form the subject matter of a claim under 1983 is performed by him not as a representative of the State under color of State law but in the context of a private practitioner.

Although the Court of Appeals for the Third Circuit did not rest its decision upon this contention (preferring to rest it upon the immunity ground), it noted that the argument had considerable persuasion. (at Page 1047)

Other cases holding that an attorney is not acting under color of State law, whether retained or appointed, are: *Dyer* v. *Rosenberg,* 434 F.2d 648 (9th Cir. 1970); *Fletcher* v. *Hook,* 446 F.2d 14 (3rd Cir. 1971); *Mulligan* v. *Schlachter,* 389 F.2d 231 (6th Cir. 1968).

Although the legislative history of the Act (Sec. 242) provides no guide as to the congressional intent in this particular fact situation, it is clear that the primary conduct that Congress sought to interdict in the enactment of this section was directed at public officials such as sheriffs, constables, and policemen, in their treatment of persons who came into their custody under color of law. 1968 U.S. Code Congressional and Administrative News, Page 1837.

The congressional intent in enacting this statute was to prohibit anyone *under color of any law* from wilfully depriving an inhabitant of a State of the right protected by the Constitution and to enforce the Fourteenth Amendment to the Constitution. *U.S.* v. *Cooney,* 217 F.Supp. 417, D.C. Colorado 1963.

The judicial impact of the decision of the Court of Appeals, if permitted to stand, will open the floodgates to a volume of litigation which will engulf the Federal Courts in an area of activity which had heretofore been regarded as violations of State and local laws. In the words of the

District Judge, it will open up a "Pandora's box". The decision of the Court of Appeals would permit the Federal Government to prosecute any state-appointed or elected official for a breach of his duties. The decision effectively nullifies the Tenth Amendment to the Constitution of the United States. Under this holding of the Court of Appeals no police powers are reserved to the States.

B.

THERE IS NO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In upholding the motion to dismiss, the District Judge stated:

> "When the verbiage concerning taking and exaction is stripped away, all that the indictment alleges is a successful demand for money in exchange for the performance of a pre-existing legal duty . . . The fatal defect in the indictment here is that it fails to allege that defendants victims were ever under any legal obligation to pay the sums demanded . . . No such obligation, in fact, existed. Unless the defendant's demands are backed by the power of the State, there is no taking in a constitutional sense. . ."

The statute under which the petitioner was appointed, Burns' 4-5716, expressly provides that only poor persons are entitled to the appointment of a public defender. If it appears that a poor person has funds to pay for counsel, the county attorney is to sue for recovery of a reasonable sum for the services rendered by the public defender and the sums so recovered go into the general county fund.

It is clear, therefore, that none of the persons named in the indictment could have been deprived of property without due process of law since, if there were funds avail-

able to defray the expense of an attorney, those funds inured to the benefit of the county general fund and are subject to recovery by the county. The statute does not purport to create a windfall for the alleged poor person in the event of an improvident appointment of the public defender. None of the persons alleged in any counts of the indictment to have been deprived of property without due process of law had acquired any property right by virtue of the appointment of the defendant as a public defender. The appointment of the defendant, if it created any property rights in anyone, created a putative and prospective cause of action for the county general fund which could only be initiated by the county attorney.

As noted by the District Judge, none of the so-called "victims" were under any legal obligation to pay the sums of money alleged to the petitioner. The statute creating the office of public defender makes it abundantly clear that, once having paid such sums, these persons have no cause of action for the recovery of such sums from anyone. Assuming *arguendo* that the persons named in the indictment to have been deprived of property without due process of law initiated an action under 42 U.S.C. 1983 against the petitioner alleging deprivation of property without due process of law, it is clear that the action could not be maintained without reference to the color of law requirement. They have been deprived of nothing. The only entity that could conceivably maintain such an action against the petitioner would be the county general fund. The county general fund clearly is not an inhabitant within the meaning of Section 242, nor is the county general fund alleged to have been deprived of property without due process of law.

C.

THE GOVERNMENT HAS ABANDONED ITS RIGHT OF APPEAL.

The second indictment is substantially identical to the indictment which the District Court dismissed against the same defendant in the prior proceeding. The former indictment contained the following language:

> ". . . notwithstanding his appointment as pauper attorney in or about March of 1967, Nick Senak illegally charged Larry Laban Smith a fee to represent him, thereby depriving him of property without due process of law . . ."

The second indictment reads as follows:

> ". . . notwithstanding his appointment as pauper attorney, Nick Senak willfully and unlawfully exacted and took approximately $400 from Larry Laban Smith, by representing to Smith that a payment of money to him (Senak) was required, or he would not adequately represent Smith in connection with that same matter as to which Senak had already been appointed to represent Smith as pauper attorney; and Nick Senak did thereby willfully deprive Larry Laban Smith of property without due process of law . . ."

The amplification of the indictment by the added language does not materially alter the present indictment from the former indictment. The allegations in the present indictment merely amplify and specify the purported unlawful means by which the defendant deprived the named person in each count of the indictment of property without due process of law.

If the Government ever had the right to appeal from the order dismissing the indictment, that right ripened upon the dismissal of the first indictment.

18 U.S.C. 3731 permits an appeal by the Government in all criminal cases from a decision or judgment setting aside or dismissing any indictment or information or any count thereof. The Government's right of appeal is limited under this Section to those situations where the dismissal is based on a defect in the indictment or information or in the institution of the prosecution. *U. S.* v. *Apex Distributing Company,* CA 9, (1959) 270 F.2d 747.

When the Government chose to abandon the appeal by voluntarily dismissing the same, the effect of such dismissal was to leave the judgment of the District Court in full force. *Newman* v. *Moyers,* 253 U.S. 182, 40 S.Ct. 478, 64 L.Ed. 849 (1920).

The effect of the dismissal is to leave undisturbed the judgment of the lower Court and may be said to thereby in effect affirm that judgment. *International Association of Machinists* v. *Federated Association of Accessory Workers,* 133 Texas 624, 130 S.W.2d 282 (1939). The trial judgment is left undisturbed and may be regarded as res judicata. *Bankers Life and Casualty Company* v. *Chicago,* 21 Ill. 2d 172, 171 N.E.2d 577 (1961).

The unqualified dismissal of an appeal makes the judgment or order appealed from final as between the parties and res judicata, unless the appellant obtains an order setting aside the dismissal and reinstating the appeal. *Rowland* v. *Kreyenhagen,* 24 Cal. 52 (1864).

The dismissal of an appeal operates to prevent a second appeal and relieves the judgment or order from susceptibility to attack for any error or irregularity which could have been taken advantage of upon the dismissed appeal. *Sullivan* v. *Gage,* 145 Cal., 79 Pa. 537 (1905)

A dismissal for want of prosecution is a bar to a subsequent appeal, except where the later appeal is predicated

on newly discovered evidence or grounds for a new trial. *Anderson* v. *Richards,* 173 Ohio St. 50, 179 N.E. 2d 918 (1962).

When the Court in the first proceeding sustained the motion to dismiss, there were two avenues open to the Government. First, the Government had the option, under Rule 12(5) of the Rules of Criminal Procedure, to request the Court to order the defendant be held in custody or bail be continued for a specified time pending the filing of a new indictment or information. The second option available to the Government was to stand on the Court's ruling sustaining the motion to dismiss and to perfect an appeal therefrom.

This was the course that the Government did, in fact, follow. When the Government abandoned the appeal and the appeal was dismissed for want of prosecution, the judgment of the District Court was in effect affirmed and now bars the second indictment on principles of res judicata, collateral estoppel and former jeopardy. *White* v. *U.S.,* 377 F.2d 948 (1967), CA D.C.; Cf. *U. S.* v. *Ponto,* 454 F.2d 657 (1971) CA7; *U. S.* v. *Grochowski,* 454 F.2d 657 (1971) CA7.

The doctrine of res judicata applies with equal force to questions of law. Where a question of law essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action where both causes of action arose out of the same subject matter or transaction. American Law Institute, Restatement Judgments, Sec. 70; *Tait* v. *Western Maryland Railroad Company,* 289 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405 (1933); *U. S.* v. *Moser,* 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924).

CONCLUSION

Numerous decisions have been cited which hold that a attorney, whether retained or court-appointed, is not actin under color of State law within the meaning of 42 U.S.C 1983, the civil counterpart of Sec. 242. If the condu alleged by the Government to have been committed by th petitioner is, in fact, true, there are abundant remedi available in the State courts. The conduct alleged woul sustain a prosecution under Indiana law for extortion, o taining money under false pretenses, or theft. In additio disciplinary proceedings could be maintained against th petitioner. The thrust of the decision of the Court Appeals for the Seventh Circuit does exactly what th District Judge feared—it opens up a "Pandora's box", stretches the concept of deprivation of property to th breaking point. The indictment does not allege that an of these indigent defendants were deprived of their rig to counsel, nor is it alleged that they were inadequate represented by counsel. The persons who allegedly pa money to the petitioner were under no compulsion to do s

For all of the above and foregoing reasons, a writ certiorari should issue to review the judgment and opini of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

MAX COHEN
504 Broadway, Suite 1012
Gary, Indiana
(219) 886-3505
Attorney for Petitioner

APPENDIX

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 SEPTEMBER SESSION, 1972

No. 72-1431

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

NICK SENAK,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 72-H-CR-6
GEORGE N. BEAMER, *Judge.*

ARGUED DECEMBER 5, 1972 — DECIDED APRIL 24, 1973

Before FAIRCHILD, PELL, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* In February 1972, a federal grand jury returned a five-count indictment against Nick Senak, a public defender for Lake County, Indiana. The indictment charged that Senak while acting under color of law, "willfully and unlawfully exacted and took" money from various persons, thereby willfully depriving those persons

of their right under the Fourteenth Amendment not to be deprived of property without due process of law, in violation of 18 U.S.C. § 242.[1] More specifically, notwithstanding his appointment under Indiana law as a "pauper attorney," by virtue of which he was entitled to governmental compensation,[2] Senak had allegedly exacted fees from a pauper "client" (Count I) and from friends or relatives of other impoverished "clients" (Counts II-V) by threatening inadequate legal representation of those he had been appointed to represent unless the extra sums were paid to him.

On March 27, 1972, the district court reluctantly sustained Senak's pre-trial motion to dismiss the indictment on the ground that the indictment failed to state an offense against the United States. The Government seeks reversal of the court's order dismissing the indictment.

---

[1] 18 U.S.C. § 242 provides in pertinent part:

"Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States . . . [is guilty of an offense.]"

[2] Ind. Ann. Stat. § 4-5716, Burns 1968 Repl., authorizes criminal court judges in counties having a population of 400,000 or more to appoint public defenders to defend any poor person accused of the commission of a crime who lacks the means to employ an attorney. If it appears to the judge that a person previously deemed to be a "poor person" has funds to pay for counsel, the county attorney is to sue for recovery of a reasonable sum for the services rendered by the public defender. The sums recovered go into the general county fund. The compensation to be paid public defenders is determined by the criminal court judges and comes from public funds. § 4-5717.

We must, as an initial matter, determine whether the Government is barred from maintaining this appeal. The indictment involved in this appeal is the second against Senak under 18 U.S.C. § 242. An indictment returned in May 1971 had been dismissed by the district court on October 19, 1971, on Senak's motion. The Government had filed a notice of appeal as to that dismissal but later had moved successfully under Rule 42(b), Fed. R. App. P., to dismiss its appeal. Senak claims that the second indictment is substantially the same as the first one and that "[w]hen the Government abandoned the appeal [of the dismissal of the May 1971 indictment] and the appeal was dismissed for want of prosecution, the judgment of the district court was in effect affirmed and now bars the second indictment on principles of res judicata, collateral estoppel and former jeopardy."

The cases on which Senak relies, including this court's decision in *United States* v. *Ponto*, 454 F.2d 657 (7th Cir. 1971) (en banc), are distinguishable. A federal grand jury may return a second indictment for the same offense when the first indictment has been dismissed or otherwise found defective. *United States* v. *Root*, 366 F.2d 377, 383 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967); *Buie* v. *United States*, 76 F.2d 848, 849 (5th Cir. 1935), *cert. denied*, 296 U.S. 585-86 (1936); *United States* v. *Manetti*, 323 F. Supp. 683, 690-91 (D. Del. 1971). *Cf.* 18 U.S.C. § 3289. Further, we disagree that the Government's decision not to pursue its appeal precluded the grand jury from returning another indictment on the same matter. *Cf. United States* v. *Beard*, 414 F.2d 1014, 1017 (3d Cir. 1969). Senak was not put in jeopardy; jeopardy is usually held to "attach" at the time trial commences and a jury is impanelled. See *United States* v. *Jorn*, 400 U.S. 470,

480 (1971); *Cf. Illinois* v. *Somerville,* 41 U.S.L.W. 4319 (U.S., Feb. 27, 1973). We therefore hold that the second indictment was not barred.

Rule 7(c), Fed. R. Crim. P., requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense." "The true test of the sufficiency of an indictment is . . . whether it contains the elements of the offense intended to be charged." *Hagner* v. *United States,* 285 U.S. 427, 431 (1932), quoted in *United States* v. *Debrow,* 346 U.S. 374, 376 (1953). The elements of an 18 U.S.C. § 242 offense are: (1) the defendant's acts must have deprived someone of a right secured or protected by the Constitution or laws of the United States; (2) the defendant's illegal acts must have been committed under color of law; (3) the person deprived of his rights must have been an inhabitant of a State, Territory or District; and (4) the defendant must have acted willfully. *See United States* v. *Jackson,* 235 F.2d 925, 927 (8th Cir. 1956). Only elements (1) and (2) are in dispute on this appeal.

Senak contends that a public defender is immune from liability under § 242 and that, once he is appointed in a given case, he does not act under color of state law but functions purely as a private attorney. For this proposition, Senak relies on *Brown* v. *Joseph,* 463 F.2d 1046 (3d Cir. 1972), where the question was whether a Pennsylvania county public defender could be held liable for damages in an action brought by a former indigent client who alleged constitutional deprivations under 42 U.S.C. § 1983, the civil counterpart of 18 U.S.C. § 242. The district court there held that the complaint failed to state a claim upon which relief could be granted on the basis that the defendant was not acting under color of state

law. On appeal, the Third Circuit decided it need not reach the "under color of any law" question. The court instead held that a county public defender enjoys immunity from liability under the Civil Rights Act.

Brown, supra, the one case Senak cites on this issue, is inapposite. The court's remarks about "color of law" are dicta. Further, an examination of the holding there reveals that the court was concerned with immunity for state judges, prosecutors, and public defenders "for acts done in the performance of [their] judicial function[s] . . . ." 463 F.2d at 1048. The court recognized an exception to immunity where the officials' acts are clearly outside the scope of the officials' jurisdiction. *Id.* Also, the court emphasized certain policy considerations which are irrelevant to the charge in the indictment before us, *e.g.*, the importance of encouraging the officials' "free exercise of professional discretion in the discharge of pre-trial, trial, and post-trial obligations." *Id.*

Senak provides neither binding precedent nor persuasive reasons to lead us to conclude that the Government would be unable, as a matter of law, to satisfy the "color of law" requirement. See *United States* v. *Classic,* 313 U.S. 299, 326 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." See generally *Screws* v. *United States,* 325 U.S. 91, 107-111 (1945). At this juncture we do not know, for example, in what words Senak couched his alleged demands for money or what representations he made to the alleged "victims." Nor do we know all the conditions that attached to Senak's appointment as public defender, *i.e.*, the duties and ethical conduct required by law of some-

one assuming such a position. If the indictment is sufficient in other respects, the Government should be given the opportunity to try to establish that Senak acted "under color of . . . law."

The district court's objections to the indictment centered on the supposed absence of the "deprivation of a constitutional right" element. Implicit in its discussion, however, were doubts about the "under color of any law" requirement. In the court's view, to hold that the defendant, by charging a fee, had deprived the named persons of property without due process of law was "to strain that concept well past its breaking point."

The "constitutional deprivation" element of the section 242 offense charged here consists of three concepts: the right to "property," a "deprivation," and "due process." It is clear that the right to acquire, enjoy, own, and dispose of property is protected by the Constitution. Each count of the indictment against Senak referred to the named person's right to property under the Fourteenth Amendment and specified the form of that property (money) and the approximate amount allegedly taken. *Cf. United States* v. *Konovsky,* 202 F. 2d 721, 726 (7th Cir. 1953).

A more difficult problem is whether Senak's alleged conduct constituted a "deprivation" under the Constitution. The district court considered that term to import a "taking" in the sense of "a nonconsensual divestiture compelled by legal authority" and reluctantly concluded that the indictment failed to allege such a "taking":

> "When the verbiage concerning 'taking' and 'exaction' is stripped away, all that [the indictment] alleges is a successful demand for money in exchange for the

> performance of a pre-existing legal duty. . . . The fatal defect in the indictment here is that it fails to allege that defendant's 'victims' were ever under any legal obligation to pay the sums demanded. . . . [N]o such obligation in fact existed. Unless the defendant's demands . . . are backed by the power of the state, there is no 'taking' in a constitutional sense."

In its prior opinion sustaining the motion to dismiss directed to the first indictment, which opinion was incorporated by reference in the second opinion, the district court stated: "There is no claim that those charged [a fee] were ever under any compulsion, legal *or otherwise*, to pay. . . ." (Emphasis added.)

It would seem obvious that there was no legal compulsion. Senak was being paid by the state and could not have successfully claimed any additional compensation from those he represented, either directly or vicariously. However, that he had no legal right to the money he supposedly collected or that the named "victims" might have asserted a successful defense to a suit by him for payment does not preclude the possibility that Senak "deprived" those persons of their property. *See United States* v. *Barr*, 295 F. Supp. 889 (S.D. N.Y. 1969); *cf. Culp* v. *United States*, 131 F. 2d 93 (8th Cir. 1942).

It appears to us that reality is ignored to say that there is no compulsion "otherwise"on an impoverished person who has supposedly been provided with legal representation or on his relatives and close friends when they are confronted with a demand from that counsel, ostensibly by virtue of his appointment "backed by the power of the state," for additional compensation if there is to be adequate representation. The constitutional right to appointed counsel does not contemplate any standard less than adequate representation.

We are not here dealing with the inherent variation in legal skills existing from lawyer to lawyer. Attorneys appointed to represent indigents, like retained counsel, undoubtedly will possess varying degrees of legal acumen; none, however, should be purposely inadequate. When the matter is baldly put as a choice between adequate representation possibly followed by an acquittal and inadequate representation which could reasonably assure a conviction, the choice is surely of the Hobson variety.

The litigant with means can choose his counsel. The pauper cannot, and his constitutional right to appointed counsel has not been extended to the point of affording him this privilege. That it has not been should be no basis for exposing him to the necessity of trying by some means to gather together funds to compensate the attorney whom he has not selected and who has told him that without those funds he would not be competently represented.

Finally, we note that a "deprivation" does not have to be authorized by state law. *See, e.g., Catlette* v. *United States,* 132 F. 2d 902, 905 (4th Cir. 1943). A defendant must act "under color of . . . law," but his acts need not have been in compliance with the law. *United States* v. *Wiseman,* 445 F. 2d 792, 796 (2d Cir. 1971), *cert. denied,* 404 U.S. 967. The Government claims that Senak's official position enabled him to perpetrate a scheme of obtaining money to which he was not entitled. His being county public defender allegedly gave him the opportunity to make the demands and clothed him with the authority of the state in so doing.

In sum, we think that the district court construed the "deprivation" requirement too narrowly.

By emphasizing compulsion and coercion, the district court seemed to suggest that "deprivation" is a taking accomplished without adherence to proper procedures. The

term "deprivation" by itself, however, connotes neither legality nor illegality. The portion of the Fourteenth Amendment with which we are concerned in this case—"nor shall any State deprive any person of life, liberty, or property, without due process of law"—indicates that the violation of due process standards makes a particular "deprivation" an objectionable, illegal "deprivation." *Cf. Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). That is, the Amendment focuses on the means by which the "deprivation" is achieved.

The Government argues that "the named victims possessed certain constitutional rights both before and after defendant's appointment [as public defender]; specifically, each citizen's basic, continuing right to use and control his own property until such time as he voluntarily disposes of it . . . or it is taken from him through means consistent with due process standards . . ."

In our opinion, the indictment satisfactorily alleges a violation of that constitutional right.

Senak argues by way of conclusion that "[a]t best, the indictment alleges a procedural violation of State law by the defendant." As we have explained, we find that the indictment does allege a violation of federal rights. Senak's assertion prompts the recall of Mr. Justice Frankfurter's challenging words, "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943).

We thus disagree with the district court's assessment that this case does not warrant the exercise of federal jurisdiction. We do, however, understand the court's apprehension that the Government has opened a Pandora's box. We have held that the particular indictment before us

adequately states an offense under 18 U.S.C. § 242; we intimate no opinion about the sufficiency of other possible indictments under section 242 involving different factual situations.

The order dismissing the February 1972 indictment is reversed, and the cause is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FAIRCHILD, *Circuit Judge* (concurring). While I agree that the instant indictment states an offense against the United States under 18 U.S.C. §242, the legal theory upon which the indictment is grounded does not, in my view, satisfactorily grapple with the primary "deprivation" effected by defendant's alleged conduct.

The right of indigents to appointed counsel is guaranteed by the Sixth Amendment. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). And, the "essence of this right is the right to effective, competent and adequate representation." *Wilson* v. *Phend*, 417 F. 2d 1197, 1199 (7th Cir. 1969). See also, *Calloway* v. *Powell*, 393 F. 2d 886, 888 (5th Cir. 1968). Thus, if an appointed attorney threatens to provide less than adequate legal services for an indigent defendant unless paid additional sums, he in effect subjects that defendant to a deprivation of his Sixth Amendment rights.

It is this subjection of an indigent to deprivation of his Sixth Amendment rights which is the real harm posed by defendant's alleged conduct. Accordingly, the indictment would be better framed if it focused upon this reality.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Criminal No. 72 H Cr 6

UNITED STATES OF AMERICA

-vs-

NICK SENAK

ORDER

(Filed March 27, 1972)

Defendant has moved that the indictment be dismissed for failure to charge an offense against the United States. The motion is GRANTED.

George N. Beamer
U. S. District Judge

Enter: March 27, 1972

MEMORANDUM

The indictment herein is simply a revised form of the indictment in *United States* v. *Senak*, 71 H Cr. 61 (N.D. Ind. 1971), which was dismissed on October 19, 1971, for

failure to charge an offense against the United States. A representative allegation there was that:

> [n]otwithstanding his appointment as pauper attorney, in or about March of 1967 Nick Senak illegally charged Larry Laban Smith a fee to represent him, thereby depriving him of property without due process of law.

The equivalent here is that:

> [n]otwithstanding his appointment as pauper attorney, in or about March of 1967 Nick Senak wilfully and unlawfully exacted and took approximately $400.00 from Larry Laban Smith, by representing to Smith that a payment of money to him (Senak) was required, or he would not adequately represent Smith in connection with the same matter as to which Senak had already been appointed to represent Smith as pauper attorney; and Nick Senak did thereby wilfully deprive Larry Laban Smith of property without due process of law.

The present indictment suffers from precisely the same infirmities as its predecessor. When the verbiage concerning "taking" and "exaction" is stripped away, all that it alleges is a successful demand for money in exchange for the performance of a pre-existing legal duty. Such conduct is certainly unethical, and good cause for removal from office. It may well be criminal under state law. However, as the court stated in its previous memorandum, "to characterize it as a deprivation of property without due process is to strain that concept well past its breaking point.

A deprivation of property without due process requires a "taking," a nonconsensual divestiture compelled by legal authority. The fatal defect in the indictment here is that

it fails to allege that defendant's "victims" were ever under any legal obligation to pay the sums demanded. They may have *felt* obliged, either through ignorance or through lack of confidence in the alternatives,[1] but no such obligation in fact existed. Unless the defendant's demands, however unreasonable or unlawful, are backed by the power of the state, there is no "taking" in a constitutional sense.

Defendant's motion to dismiss must therefore be granted. A copy of the court's previous memorandum is attached hereto and incorporated herein.

---

[1] Defendant's alleged conduct could have been reported to the court, the prosecutor, or the police; and if those officials were properly performing the duties of their respective offices, defendant would have been disciplined or discharged.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Criminal No. 71 H Cr 61

UNITED STATES OF AMERICA

-vs-

NICK SENAK

ORDER

(Filed October 19, 1971)

Defendant has moved that the indictment be dismissed for failure to charge an offense against the United States. The motion is GRANTED.

George N. Beamer
U. S. District Judge

Enter: October 19, 1971

MEMORANDUM

This is a criminal prosecution under 18 U.S.C. §242, the criminal counterpart of the Civil Rights Act of 1871. So far as pertinent, §242 provides as follows:

> Whoever, under color of any law, . . . wilfully subjects any inhabitant of any State . . . to the depriva-

> tion of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than $1,000 or imprisoned for not more than one year, or both.
>
> . . .

Defendant, a duly appointed public defender for Lake County, Indiana, is charged in a five-count indictment with violating that statute by depriving various individuals of property without due process of law. The individuals in question were friends and relatives of indigents defendant was appointed to represent, and in one count, the indigent himself. The alleged deprivation of property consisted in illegally charging a fee for his services.

Defendant contends that the indictment fails to state an offense against the United States, and the court is compelled, albeit reluctantly, to agree. The government's theory is that by charging a fee for his services, defendant deprived those charged of their right under the Fourteenth Amendment not to be deprived of property without due process of law. Simplifying the verbiage, the contention is that by charging a fee, defendant deprived his "clients" of property without due process.

A deprivation of property without due process, if done wilfully and under color of law, does violate §242. But there has to be a "deprivation," in the sense in which that term is used in the Constitution. In that context, the term imports a "taking"—a nonconsensual divestiture compelled by legal authority. No such taking is claimed here. The indictment alleges only that defendant "charged" a fee. There is no claim that those charged were ever under any compulsion, legal or otherwise, to pay, or that any payments made, however misguided, were other than consensual. Defendant's alleged conduct may have constituted obtaining money under false pretences, or solici-

tation of bribery, but to characterize it as a deprivation of property without due process is to strain that concept well past its breaking point.

To hold otherwise would open a Pandora's box. The court clerk who solicits a "tip" for docketing a case, the policeman who accepts a bribe for tearing up a ticket perhaps even the employee in the clerk's office who embezzles funds from the registry of the court, would all have violated the constitutional rights of their "victims." All that the government's theory would seem to require is that a state or local employee's position give him an opportunity to secure money illegally. That is not the kind of case that Congress had in mind when it enacted §242 and it is not the kind of case that warrants the exercise of federal jurisdiction.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

---

72 H Criminal No. 6
Title 18 U.S.C. §242

UNITED STATES OF AMERICA

v.

NICK SENAK

(Filed February 10, 1972)

The Grand Jury Charges:

COUNT I

In or about March, 1967, in Lake County, Indiana, Nick Senak, who was then and there serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana, did willfully subject Larry Laban Smith, an inhabitant of the State of Ohio, to the deprivation of the right secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of property without due process of law, as hereinafter more fully set forth:

On or about February 28, 1967, the judge of the Lake County Criminal Court found Larry Laban Smith to be without funds, and appointed pauper attorney Nick Senak

to represent him. Notwithstanding his appointment as pauper attorney, in or about March of 1967 Nick Senak willfully and unlawfully exacted and took approximately $400.00 from Larry Laban Smith, by representing to Smith that a payment of money to him (Senak) was required, or he would not adequately represent Smith in connection with that same matter as to which Senak had already been appointed to represent Smith as pauper attorney; and Nick Senak did thereby willfully deprive Larry Laban Smith of property without due process of law.

In violation of 18 U.S.C. §242.

COUNT II

In or about October, 1966 in Lake County, Indiana, Nick Senak, who was then and there serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana, did willfully subject James Cadle, an inhabitant of the State of Michigan, to the deprivation of the right secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of property without due process of law, as hereinafter more fully set forth:

In or about September 1966, the judge of the Lake County Criminal Court found Hobart Cadle, the father of James Cadle, to be without funds, and appointed pauper attorney Nick Senak to represent him. Notwithstanding his appointment as pauper attorney, in or about October of 1966 Nick Senak willfully and unlawfully exacted and took approximately $100.00 from James Cadle, by representing to James Cadle that a payment of money to him (Senak) was required, or he would not adequately represent Hobart Cadle in connection with that same matter as to which he had already been appointed to represent

him as pauper attorney; and Nick Senak did thereby willfully deprive James Cadle of property without due process of law.

In violation of Title 18 U.S.C. §242.

COUNT III

In or about November, 1966, in Lake County, Indiana Nick Senak, who was then and there serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana, did willfully subject Willie Drake, an inhabitant of the State of Illinois, to the deprivation of the right secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of property without due process of law, as hereinafter more fully set forth:

In or about October, 1966, the judge of the Lake County Criminal Court found Ernest Drake, nephew of Willie Drake, to be without funds, and appointed pauper attorney Nick Senak to represent him. Notwithstanding his appointment as pauper attorney, in or about November, 1966 Nick Senak willfully and unlawfully exacted and took approximately $180.00 from Willie Drake, by representing to Willie Drake that a payment of money to him (Senak) was required, or he would not adequately represent Ernest Drake in connection with that same matter as to which he had already been appointed to represent him as pauper attorney; and Nick Senak did thereby willfully deprive Willie Drake of property without due process of law.

In violation of Title 18 U.S.C. §242.

COUNT IV

In or about May, 1968, in Lake County, Indiana, Nick Senak, who was then and there serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana, did willfully subject Honore Gilarski, an inhabitant of the State of Indiana, to the deprivation of the right secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of property without due process of law, as hereinafter more fully set forth:

In or about September, 1967, the judge of the Lake County Criminal Court found Steve Laposi, a friend of Honore Gilarski, to be without funds, and appointed pauper attorney Nick Senak to represent him. Notwithstanding his appointment as pauper attorney, in or about May of 1968, Nick Senak willfully and unlawfully exacted and took approximately $800.00 from Honore Gilarski, by representing to her that a payment of money to him (Senak) was required, or he would not adequately represent Steve Laposi in connection with that same matter as to which he had already been appointed to represent him as pauper attorney; and Nick Senak did thereby willfully deprive Honore Gilarski of property without due process of law.

In violation of Title 18 U.S.C. §242.

COUNT V

In or about September, 1967, in Lake County, Indiana, Nick Senak, who was then and there serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana, did willfully subject Victor Neier, an inhabitant of the State of Indiana, to the deprivation of the right secured and pro-

tected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of property without due process of law, as hereinafter more fully set forth:

On or about May 18, 1967, the judge of the Lake County Criminal Court found Claude Neier, the son of Victor Neier, to be without funds and appointed pauper attorney Nick Senak to represent him. Notwithstanding his appointment as pauper attorney, in or about September of 1967 Nick Senak willfully and unlawfully exacted and took approximately $300.00 from Victor Neier, by representing to him that a payment of money to him (Senak) was required, or he would not adequately represent Claude Neier in connection with that same matter as to which he had already been appointed to represent him as pauper attorney; and Nick Senak did thereby willfully deprive Victor Neier of property without due process of law.

In violation of Title 18 U.S.C. §242.

Julius J. Valberg
Foreman

William C. Lee
William C. Lee
United States Attorney

APPENDIX D

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
June 5, 1973

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT R. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 72-1431 vs.

NICK SENAK,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

On consideration of the petition of defendant-appellee Nick Senak, for a rehearing by the Court *en banc* in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendant-appellee for a rehearing *en banc* in the above entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-58

NICK SENAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 477 F. 2d 304. The unreported opinion of the district court is reprinted at Pet. App. 11-13.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1973, and a timely petition for rehearing was denied on June 5, 1973. The petition for a writ of certiorari was filed on July 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States is precluded from appealing the dismissal of a second indictment because it did not pursue an appeal from the dismissal of a differently worded first indictment concerning the same incidents.

2. Whether an indictment, alleging that a state-employed public defender, while acting under color of law, "willfully and unlawfully" exacted and took money from indigent clients and their friends and relatives by threatening inadequate legal representation unless such sums were paid, states an offense against the United States.

STATEMENT

Petitioner was charged in a five-count indictment (Pet. App. 17-21) with using his office of public defender (or pauper's attorney) to exact money from indigent clients.[1] Although paid a salary by the State of Indiana for his services as a public defender for Lake County,[2] petitioner, according to the indictment, unlawfully required indigent clients (or their friends and relatives) to pay him additional money before he would adequately represent them. The indictment charged that petitioner, while acting under color of law, deprived persons of property without due process of law in violation of 18 U.S.C. 242.

A previous indictment against petitioner concerning the same incidents had been returned by a federal grand jury nine months earlier (see Pet. 13 for pertinent portions of that indictment). The district court dismissed the earlier indictment for failure to state an offense (Pet. App. 14), and the United States did not pursue an appeal from that decision. Instead, a second and differently-worded indictment was obtained.

This indictment—which is the subject of the present case—was also dismissed by the district court for failure to state an offense (Pet. App. 11). The district court said, "[t]he fatal defect in the indictment here is that it fails to allege that defendant's 'victims' were ever under any *legal* obligation to pay the sums demanded" (Pet. App. 12-13; emphasis added).

---

[1] See Pet. 4.

The court of appeals reversed (Pet. App. 1-10), holding that there was compulsion on the part of the petitioner to exact funds from the victims, and that it was irrelevant that no legal obligation to pay the sums existed (Pet. App. 7, 8). Petitioner seeks review of this ruling of the court of appeals.

ARGUMENT

Petitioner presents three reasons for granting the petition: (1) petitioner was not acting under color of law; (2) there was no deprivation of property without due process of law; and (3) the United States abandoned its right of appeal. The court of appeals considered and unanimously rejected all of these arguments. In our view, the decision below is correct, and none of the issues presented warrants plenary review by this Court.

1. Petitioner suggests (Pet. 13) that the government has somehow abandoned its right of appeal. After the first indictment was dismissed by the district court, the United States obtained a second indictment instead of pursuing an appeal from the dismissal of the first indictment. This second indictment was differently worded, and was an attempt to satisfy the district court's determination that the first indictment did not properly allege a deprivation of property without due process of law.

It is well settled that a federal grand jury can return a second indictment for the same offense where the first indictment has been dismissed or otherwise found defective, and the defendant has not been placed in jeopardy. *United States* v. *Root,* 366 F. 2d 377, 383 (C.A. 9), certiorari denied, 386 U.S. 912; *Buie* v. *United States,* 76 F. 2d 848, 849, certiorari denied, 296 U.S. 585; *United States* v. *Manetti,* 323 F. Supp. 683, 690 (D. Del.). Indeed, Congress has explicitly provided that,

in such circumstances, the statute of limitations is tolled where the limitations period would expire before a second indictment could be returned. 18 U.S.C. 3289.

The United States' right to appeal the dismissal of an indictment is set forth in 18 U.S.C. 3731, which provides, in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

This Section thus authorizes an appeal in this case unless there is present a violation of the double jeopardy clause. But jeopardy had not attached at the time the first indictment was dismissed, since it attaches when the jury is impanelled and the trial commences. See, *e.g., United States* v. *Jorn,* 400 U.S. 470. Cf. *Illinois* v. *Somerville,* 410 U.S. 458. Here, the first indictment was dismissed on a pre-trial motion and, of course, no trial had begun. Therefore, the double jeopardy clause is not applicable and Section 3731 authorizes an appeal.[3]

2. In attacking the sufficiency of the indictment, petitioner contends (Pet. 7) that the indictment fails to state

---

[3] Petitioner is in error in contending that the doctrine of *res judicata* and the cases of *Tait* v. *Western Maryland Railway Company,* 289 U.S. 620, and *United States* v. *Moser,* 266 U.S. 236, are applicable to the present case (see Pet. 15). The *Tait* and *Moser* decisions are civil cases which merely hold that questions actually litigated in a preceding case are not subject to relitigation in a subsequent civil case between the same parties.

an offense because he was not acting under "color of law." The indictment recites that petitioner committed the actions alleged while "serving as duly appointed pauper attorney of Lake County, Indiana, acting under color of the laws of the State of Indiana" (Pet. App. 17), but petitioner contends that he could not have been acting under color of law while serving in that capacity (see Pet. 10-11). The district court did not consider this question, but the court of appeals specifically rejected the argument, and held that the indictment was sufficient to state an offense and that the "Government should be given the opportunity to try to establish that [petitioner] acted 'under color of * * * law'" (Pet. App. 6).

The allegations of the indictment fully meet the test for action taken under color of law. In *United States* v. *Classic*, 313 U.S. 299, 326, a leading case on the interpretation of what is now Section 242 of Title 18 of the United States Code, this Court said:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

More recently, this Court has reviewed the history of the judicial interpretation of the color of law concept and concluded that "'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States* v. *Price*, 383 U.S. 787, 794, n. 7 (citations omitted). Thus, all that is required is "significant state involvement." See, *e.g.*, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

The public defender's office (or pauper attorney) was created by state statute, and the petitioner is paid a salary by the State. Burns Ind. Stat. 4-5716, 4-5717. According to the indictment, it was his holding of the office of county pauper attorney which enabled petitioner to exact money from his victims (see Pet. App. 8).

The cases cited by petitioner for the proposition that a public defender does not act under color of law (Pet. 7-10) are distinguishable from the present case. In those cases—all of which are civil—plaintiffs were complaining that their attorney did not adequately represent them. That is very different from an allegation that the attorney used a state salaried office to exact money illegally from a client. The present case, we submit, is an instance of "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law * * *."

3. Petitioner also contends (Pet. 11) that the indictment does not allege a deprivation of property without due process of law. The court of appeals rejected this contention as an unduly narrow interpretation of the "deprivation" requirement of Section 242 (Pet. App. 8).

Petitioner first suggests that there could have been no deprivation because there was never any legal obligation on the part of the victims to pay the sums demanded (Pet. 11, 12). But it is immaterial that the victim may have been able successfully to defend a suit by petitioner for payment of the sum demanded. *United States* v. *Barr*, 295 F. Supp. 889 (S.D. N.Y.); cf. *Culp* v. *United States*, 131 F. 2d 93 (C.A. 8). As the court of appeals said, "a 'deprivation' does not have to be authorized by state law" (Pet. App. 8); *United States* v. *Wiseman*, 445 F. 2d 792 (C.A. 2), certiorari denied, 404 U.S. 967; *Catlette* v. *United States*, 132 F. 2d 902 (C.A. 4). All that is required is that the deprivation of property

be in violation of due process of law requirements, as is alleged in the present indictment. Cf. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337.

Here, impoverished persons were confronted with illegal demands from a public defender for additional funds if they wanted adequate legal representation. When faced with such demands, "a choice between adequate representation possibly followed by an acquittal and inadequate representation which could reasonably assure a conviction, the choice is surely of the Hobson variety" (Pet. App. 8). To say, as petitioner does, that "[t]he persons who allegedly paid money to the petitioner were under no compulsion to do so" (Pet. 16) ignores reality.

Petitioner also argues that none of the persons named in the indictment could have been deprived of property without due process of law because the county attorney could have recovered from them whatever they paid petitioner by way of attorney's fees (on the ground that his clients, by making the payments, indicated that they were not truly indigent and therefore not entitled to his free services). Burns Ind. Stat. 4-5716. But, even assuming the right of the county attorney, it obviously does not follow that *petitioner's* action afforded the victims due process of law. Cf. *Fuentes* v. *Shevin*, 407 U.S. 67; *Sniadach* v. *Family Finance Corp.*, *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
ROBERT A. MURPHY,
JOHN C. HOYLE,
Attorneys.

AUGUST 1973.

DOJ-1973-08

In th

LARR

PETI